Confronting the Issue of Gun Seizure in Domestic Violence Cases

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Despite the clear goal of federal and state firearms laws—to protect victims—confronting the issue of guns and domestic violence raises complex legal and practical concerns for the courts and law enforcement agencies that are grappling with the laws' implementation. Yet the numbers make it clear that communities working together to improve their response to domestic violence cannot afford to put off addressing these concerns.

This article briefly reviews the federal firearms laws relating to domestic violence and discusses issues regarding their interpretation, then examines the difficulties that have arisen in their enforcement. Next it analyzes state laws designed to address firearms and domestic violence and discusses legal issues that have arisen in their implementation. Finally, it concludes with several recommendations to state judges, law enforcement officials, and prosecutors for effective policies and procedures gleaned from the lessons of other jurisdictions. ■

Firearms caused 44 percent of the 61 homicides related to domestic violence in California's San Diego County between 1997 and 2003.[1] The New York State Commission on Domestic Violence Fatalities concluded in the late '90s that firearms were used in more than half of the domestic violence homicides it investigated.[2] In Washington State, almost 60 percent of the 209 victims of domestic violence homicides from January 1997 to August 2002 were killed with a firearm.[3] Nationally, the U.S. Department of Justice reported that more than two-thirds of spouse and ex-spouse homicide victims were killed by guns.[4] As the police chief in one New Hampshire town, who is also a member of the state's domestic violence fatality review committee, put it, "[T]he fact is that the vast majority of domestic violence homicides are committed by firearms.... And half of all homicides are domestic violence–related. I don't know what people don't understand about that."[5]

Federal firearms laws passed in the last decade provide authority to ban firearm possession by many domestic violence perpetrators. But despite the obvious risk created by the availability of firearms to abusers, most jurisdictions have not developed effective strategies for addressing the problem. This is, in part, because the federal laws have proven difficult to implement and have created confusion among state and federal law enforcement agencies and the courts about their proper roles in enforcing the laws. And while a growing number of states have enacted laws barring firearm possession by domestic violence offenders, many of the state laws have significant gaps and create inconsistencies between state and federal law. Moreover, in some jurisdictions, there is basic resistance to the concept of taking guns away from private citizens. Even assuming that appropriate laws are in place and agencies stand willing to enforce them, the actual procedures for surrendering or confiscating weapons, storing them, and returning them have proven difficult to develop and implement.

FEDERAL LAW ON DOMESTIC VIOLENCE AND FIREARM POSSESSION

In recognition of the heightened risk created by access to guns in domestic violence situations, Congress added a new provision to the Gun Control Act of 1968 as part of the Violence Against Women Act of 1994.[6] That provision,

18 U.S.C. § 922(g)(8), prohibits possession of a firearm or ammunition by any person subject to a protection order that meets certain criteria. The respondent must have received both actual notice and the opportunity to participate at a hearing held before the order was issued.[7] The order must restrain the respondent from harassing, stalking, or threatening an intimate partner or a child of the intimate partner or respondent, or from engaging in conduct that would place an intimate partner in reasonable fear of bodily injury to either the partner or the child.[8] In addition, the order must either include a finding that the respondent represents a "credible threat" to the physical safety of the intimate partner or child or, by its terms, must explicitly prohibit the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury.[9] The firearm prohibition lasts only as long as the protection order itself is in effect.

Congress also defined *intimate partner* in the law to mean the respondent's spouse, former spouse, parent, or child or "an individual who cohabitates or has cohabited with the respondent."[10] The provision contains an "official-use" exception, which exempts from the law police, military personnel, and other government employees who must use weapons in connection with their official duties.[11]

In 1996, Congress again amended the Gun Control Act to prohibit anyone previously convicted of a "misdemeanor crime of domestic violence" from possessing any firearm or ammunition.[12] At that time, the Gun Control Act already contained a provision barring all convicted felons from possessing firearms.[13] The provision included domestic violence felonies, together with all other felony crimes. But in many jurisdictions domestic violence crimes were undercharged or pleaded down to misdemeanors more frequently than other felonies. The 1996 law, known as the Lautenberg Amendment and codified at 18 U.S.C. § 922(g)(9), was designed to address this fact by expanding the firearm prohibition to domestic violence misdemeanors.[14]

A conviction must satisfy several requirements to trigger the federal weapon prohibition. The defendant must have been represented by counsel and, if entitled to a jury trial, must have received one (or waived that right).[15] The crime must

- have included the use or attempted use of physical force or the threatened use of a deadly weapon; and
- have been committed by a defendant who
  - was the current or former spouse, parent, or guardian of the victim, or
  - shared a child in common with the victim, or
  - was cohabiting with or had cohabited with the victim as a spouse, parent, or guardian, or
  - was similarly situated to a spouse, parent, or guardian of the victim.[16]

The federal provision, 18 U.S.C. § 922(g)(9), is applicable when the defendant has been convicted of a misdemeanor crime of domestic violence under federal or state law and the defendant thereafter knowingly receives or possesses a firearm or ammunition and the firearm or ammunition is transported in interstate or foreign commerce. The firearm prohibition for those convicted of a misdemeanor crime of domestic violence is permanent.[17] Unlike section 922(g)(8), this section has no "official-use" exception, so law enforcement officers, military personnel, and other government employees who require weapons to perform their duties are not exempted from the weapon prohibition.

LEGAL CHALLENGES TO THE FEDERAL FIREARMS LAWS

Numerous constitutional challenges have been mounted to both sections 922(g)(8) and 922(g)(9) on several different grounds. All have ultimately failed at the federal appellate level, and they are mentioned only briefly here. More significant in terms of shaping the law at both the state and federal levels have been legal challenges based on statutory interpretation.

CONSTITUTIONAL ARGUMENTS

Constitutional challenges to section 922(g)(9) have been made on equal protection grounds because the statute applies only to defendants convicted of domestic violence misdemeanors and not to any other misdemeanants. However, the courts have held that a rational basis exists to distinguish domestic violence misdemeanors from other misdemeanors, and that therefore there is no equal protection violation.[18] Defendants have argued that section 922(g)(9) violates the Ex Post Facto Clause, because it applies retroactively to convictions that occurred before the law was enacted. But because the law makes illegal only firearm possession that occurred *after* the law was enacted, there is no ex post facto issue.[19] Commerce Clause challenges have been made, particularly in the wake of *United States v. Morrison,* where the Supreme Court struck down another provision of the Violence Against Women Act on these grounds.[20] Yet, unlike the provision at issue in *Morrison,* the firearms laws contain an explicit jurisdictional element requiring that the weapons have been in or have affected interstate or foreign commerce.[21]

Several cases have challenged the statutes on Tenth Amendment grounds, arguing that firearm regulation is a right reserved to the states. The courts, however, have held that the federal government is not usurping state law or state officers by enacting these federal laws that are prosecuted federally.[22] There have also been some challenges on Second Amendment grounds, arguing that the restrictions on firearms violate an individual's right to bear arms. This argument, too, has been rejected by the courts, which have held that the Second Amendment does not prohibit regulation of firearms.[23]

While challenges to the federal firearms statutes have occurred quite frequently, particularly in the years just after the laws' enactment, it has become clear that no constitutional impediment bars enforcement of these laws.

STATUTORY INTERPRETATIONS

Case law interpretations of federal and state firearms laws primarily center on two separate questions: Does the crime fit the federal requirement that it be a "misdemeanor crime of domestic violence," and is the protection order a "qualifying protection order" under the federal law? The following review examines some state and federal decisions addressing those questions.

The "Misdemeanor Crime of Domestic Violence" in Section 922(g)(9)

The firearm prohibition in section 922(g)(9) applies only when a defendant has been convicted of a qualifying "misdemeanor crime of domestic violence," which must satisfy several criteria. But many states have no specific domestic violence crimes in their penal codes, so a domestic violence offender may be convicted under general assault, harassment, and other criminal statutes. In those cases, what makes a crime a "domestic violence crime" is the relationship between the defendant and victim, determined from the underlying facts of each case, but that is not an actual element that must be proven for conviction. The question then arises whether these convictions qualify as "misdemeanor crimes of domestic violence" under the federal law, which requires a certain relationship between the parties. Must the relationship between the defendant and victim be an element of the state criminal statute to meet the federal requirements, or would proof of such a relationship in the facts of the case satisfy these criteria?

In *City of Cleveland v. Carpenter,*[24] the defendant pled no contest to misdemeanor assault under Ohio law for punching his ex-wife and threatening to kill her.[25] The police had seized eight weapons from the defendant's home at the time of his arrest. The lower court held that the firearms should not be returned to the defendant because he had been convicted of a misdemeanor crime of domestic violence and therefore was prohibited under 18 U.S.C. § 922(g)(9) from possessing firearms. The defendant argued that the crime of assault for which he was convicted did not meet the federal definition of *misdemeanor crime of domestic violence,* because it contained no element of relationship between the defendant and victim.

The Ohio appellate court held that the federal definition did not require that the relationship be an element of the crime of which the defendant was convicted. Because there was no dispute that the conviction was a misdemeanor under state law and that it contained an element of use or attempted use of physical force, the definition was satisfied if the conviction included the use or threat of force and if the defendant and victim actually did have one of the connections identified in the federal statute.[26] The court affirmed the lower court's ruling denying the defendant's request for return of his eight weapons.[27]

Similarly, a New Jersey appellate court held that a person convicted of a simple assault offense under state law was convicted of a "misdemeanor crime of domestic violence," as required by the federal statute, when the assault involved the use or attempted use of physical force against that person's current or former spouse or domestic partner.[28] Still, state case law is not uniform on this issue. At least one Pennsylvania court recently came to the opposite conclusion, holding that to qualify as a "misdemeanor crime of domestic violence," the required relationship between defendant and victim must be an element of the crime, not just part of the underlying facts of a particular case.[29]

The federal courts have been more consistent in concluding that, for the crime to qualify under section 922(g)(9), the relationship between the parties does not have to be an element of the crime for which the defendant was convicted.[30] This does not mean, though, that the courts can look at all facts in a case to determine whether the qualifying relationship exists. Most recently, the Ninth Circuit Court of Appeals in *United States v. Nobriga* confirmed the courts' use of the "modified categorical approach" to determine whether the criminal conviction satisfied the definitional requirements of the federal statute.[31] Under this approach, the court looks only to formal court records, such as the charging instrument and the judgment of conviction, along with the statutory elements, to determine whether the defendant in fact was convicted of a "misdemeanor crime of domestic violence" as defined under the federal law.[32]

In *Nobriga,* the defendant pled guilty to "physically abus[ing] a family or household member."[33] But the court record did not establish that the defendant and victim had ever cohabited, nor did the parties meet any of the other relationship categories of the federal statute.[34] With no record to provide evidence of a qualifying relationship, the court held that the defendant's motion to dismiss his indictment for possessing a firearm after being convicted of a misdemeanor crime of domestic violence should have been granted.[35]

This case law demonstrates that, while the predominant interpretation of section 922(g)(9) does not require that the relationship between the parties be an actual statutory element of the misdemeanor crime, state prosecutors and judges nevertheless must be careful to put the relationship between the parties on the record as well as in court documents when the case involves a misdemeanor crime involving domestic violence. Doing so will establish the necessary predicate for a qualifying conviction in any future federal prosecution for illegal possession of firearms by a person convicted of a misdemeanor crime of domestic violence. Moreover, in states where the courts have found that a relationship must be an element of the crime to qualify, prosecutors and others should consider advocating legislation that will create specific domestic violence crimes where this relationship element will be included.

A Qualifying Protection Order Under Section 922(g)(8)

For the firearm prohibition of section 922(g)(8) to apply, the respondent must have both notice and an opportunity to be heard before the underlying protection order is issued—a basic requirement of due process. But, in most states, the protection order process includes an opportunity for petitioners to obtain a temporary ex parte order that lasts for several days, until the court holds a full hearing on a final protection order. The ex parte order must then be served on the respondent, with notice of the hearing date. This suggests that Congress intended for section 922(g)(8) to exclude temporary orders from

the firearm prohibition and to impose the weapons bar only when a final order has been issued, after the defendant has had an opportunity to contest the allegations. But, given the variety of protection orders and procedures for obtaining them under state laws, questions have arisen about what kind of due process is required to establish a qualifying order for purposes of that section.

In *United States v. Calor,* the Sixth Circuit Court of Appeals addressed the validity of the underlying protection order for purposes of a conviction under that section.[36] A domestic violence victim had obtained an ex parte emergency protection order against her husband that included provisions not to possess any firearms and to turn any firearms into the local law enforcement agency.[37] It was served on the defendant with notice of a hearing on the final order to be held a few days later.[38] On the day of the scheduled hearing, defendant's counsel requested an adjournment of the hearing for several days.[39] The court granted the adjournment and did not take testimony from sworn witnesses or receive other evidence. But because the ex parte order had expired on the day of the hearing, the court issued a second temporary order that was effective through the adjourned date.[40] A few days later, before the adjourned hearing date, the defendant violated the temporary order and was arrested.[41] A search of his vehicle revealed several handguns, so he was charged under section 922(g)(8) for possession of a firearm while subject to a valid protection order.[42]

The defendant argued that the protection order was not a valid predicate for the federal charge because it did not occur after a hearing that afforded the required due process.[43] The court rejected this argument, finding that though the hearing on the final order was adjourned, the defendant had been given notice of the original hearing date and had had an opportunity to participate before the court entered the second order extending the protection until the adjourned date.[44] This second order provided the predicate order for the defendant's prosecution under section 922(g)(8).[45] The court stated, "Given that the minimum requirements of the statute comport with the requirements of due process, we . . . declin[e] to embellish the hearing requirements explicitly set forth in [section] 922(g)(8)."[46]

In *United States v. Bunnell,*[47] the defendant challenged his conviction under section 922(g)(8) because he had not appeared at the hearing on the final order of protection, nor had counsel represented him.[48] But the court rejected defendant's argument, noting that the federal law only required the order to be issued after a hearing of which the defendant had had both notice and an opportunity to participate.[49] Although the defendant had been served and received actual notice of the hearing, he had chosen not to appear and avail himself of the process to which he was entitled.[50] This is not a violation of due process, so the order was a valid predicate for the federal firearms charge.[51]

The *Bunnell* case follows the traditional rule that when a defendant receives notice and opportunity to be heard but voluntarily defaults, any ruling by the court satisfies due process requirements. The *Calor* case, by contrast, reveals a quite liberal reading of due process and may even demonstrate the courts' willingness to broadly interpret section 922(g)(8)'s due process requirements for a protection order so that the firearm prohibitions will be more likely to apply.

IMPLEMENTATION OF THE FEDERAL FIREARMS LAWS

The new firearms laws significantly expanded the protections available to victims of domestic violence and made available to law enforcement additional tools to hold batterers accountable. Despite these improvements, these laws have not lived up to their promise, and several years after their enactment they remain severely underenforced.

One important reason is the lack of guidance that the laws provide on implementation or enforcement. Although violation of the provisions is a federal crime, their central underlying predicates, a protection order or a misdemeanor conviction, are most likely to be based on state law, and thus cases are handled in state courts. This dichotomy has blurred the

line of whether state or federal authorities possess the power and the responsibility to ensure that the laws are enforced. While obviously federal prosecutors must pursue violations of federal laws, knowledge about violations is more likely to reside with local law enforcement officials and judges who are aware of existing protection orders or misdemeanor convictions. And questions arise: Because a misdemeanor conviction or the issuing of a protection order occurs in state court, do state judges then have the responsibility or authority to confiscate weapons, and should local law enforcement be responsible for follow-up with abusers who are in violation of federal law because they have not surrendered weapons?

Federal prosecutors have not pursued these cases aggressively, and prosecutions under both sections 922(g)(8) and (9) remain relatively rare.[52] One commentator has calculated that from the time section 922(g)(8) took effect in 1995 through 2001, only 187 federal prosecutions were filed under the statute.[53] This represents a minuscule 1 percent of the approximately 6,000 federal gun possession charges filed each year.[54] This level of prosecution does not come close to reaching the number of eligible cases. Judge Richard A. Posner of the Seventh Circuit Court of Appeals has estimated that approximately 40,000 people violate section 922(g)(8) each year by possessing firearms while subject to a protection order.[55] Prosecutions under section 922(g)(9) are only slightly higher. Since that statute took effect in 1996, 379 cases have been filed, representing only 2 to 3 percent of total federal gun law prosecutions.[56]

Likely explanations for this low level of prosecution include both the structure of U.S. Attorneys' offices, in which domestic violence crimes may not fall naturally within a prosecution unit, and their culture, where prosecutions that rely on state-based convictions or orders may not be as prized as the more traditional white-collar criminal investigations and prosecutions. Given these traditional priorities, federal authorities may have limited resources available to enforce the federal firearms laws.[57] Perhaps the most important explanations for the underprosecution of the firearms laws, however, lie in the lack of coordination and communication between the state and federal systems of law enforcement and prosecution, the lack of clarity of state and federal roles, and some state jurisdictions' resistance to getting involved with federal law enforcement.

Some state and local law enforcement agencies view the federal laws as an infringement on state police power because those agencies are needed to enforce the federal law.[58] Moreover, the federal government provided no additional resources to the states to help them carry out their role in enforcing federal law.[59] Certain state and local agencies have even argued that they should create and enforce their own firearms laws in this area, rather than spend their own resources enforcing federal laws.[60] The 1996 Lautenberg Amendment, which did not exempt law enforcement officers themselves from the ban on firearms for anyone convicted of a domestic violence misdemeanor, has been particularly unpopular in the law enforcement community.[61]

Some state courts have resisted involvement in the federal ban on weapon possession. Substantial anecdotal evidence suggests that some judges are attempting to evade the federal law or are directly refusing to comply with it, particularly section 922(g)(8), through their direct involvement in setting the terms of a protection order.[62] Because the order must satisfy certain requirements to qualify as a predicate for a firearm prohibition under the code, some judges have refused to make the specific findings that would meet these requirements. Others have crossed out the language on protection order forms that notifies the defendant of the federal prohibition on weapon possession while the order is in effect,[63] have written on the protection order that the federal law does not apply, or have failed to check a box on the order noting a firearm prohibition.[64] Commentators have speculated that this refusal may sometimes be due to judges' personal beliefs in the right to own guns and their reluctance to limit such access to respondents.[65] It may be particularly relevant in jurisdictions where hunting is a popular pastime, because the federal law prohibits hunting rifles, along with handguns.[66]

State judges can certainly affect whether protection orders qualify for the federal firearm ban by making (or failing to make) specific findings that federal law requires.[67] Still, a determination of whether a protection order meets the requirements of a federal statute is made exclusively under federal law. State judges cannot control the application of federal law. Therefore, if a protection order by its terms *does* meet the requirements under federal law, the federal firearm prohibition will apply, notes or crossed-out text or unchecked boxes notwithstanding.[68]

Some state courts, however, have more fundamental concerns with the role of the state in implementing federal laws, particularly where differences may exist between state and federal law in this area. The New Jersey appellate court considered this issue in *State v. Wahl.*[69] The defendant was convicted of a domestic violence misdemeanor, and under state law his weapons were confiscated. Following state procedures regarding return of weapons seized in domestic violence cases, the state judge later ordered return of the weapons after finding that the victim did not feel threatened and did not object to the return. The state argued that federal law mandates a permanent ban on weapons possession for an offender convicted of misdemeanor domestic violence,[70] and it contended that this federal law preempted the state provision and therefore the weapons should not be returned.[71]

The appellate court noted that under the Supremacy Clause, the laws of the United States "shall be the supreme law of the land."[72] Therefore, state laws that "'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution,' are invalid."[73] Under preemption doctrine, federal law will preempt a state statute if it is impossible for a court to comply with both the federal and state laws or where the state law poses an obstacle to the intent of Congress.[74]

But the court found that the state and federal firearms laws in this area did *not* conflict and that the federal law was incorporated into the state statute, because state law provided grounds for barring the return of weapons in domestic violence cases if "the owner is unfit."[75] A defendant convicted of a misdemeanor crime of domestic violence is, by definition, "unfit" under the state statute and barred from possessing any firearms under state law, as well as under section 922(g)(9).[76] Therefore, the federal and state statutes *were* consistent and the federal preemption doctrine was not relevant.[77]

The Ohio appellate court in *Conkle v. Wolfe* also made this point.[78] The Ohio protection order statute permitted a court to include in a protection order such "other relief that the court considers equitable and fair."[79] Under this provision, the state court had enjoined the respondent from possessing weapons. The court considered whether this state law conflicted with section 922(g)(8), which requires a finding in a protection order that the subject "represents a credible threat to the physical safety of an intimate partner or child" to qualify for a prohibition on weapon possession.[80] The state court had made no such finding, which was not required under state law to invoke the catchall provision permitting the bar on weapon possession.[81]

The appellate court held that because Congress's intent was to assist states in regulating firearms, not to provide obstacles against such regulation, there was no conflict between the federal and state law, and thus the federal preemption doctrine did not apply.[82] The state court was able to follow its own law to enjoin the defendant from possessing weapons without making the "credible-threat" finding required under federal law.[83] In *Benson v. Muscari,*[84] the Vermont Supreme Court also noted that the federal preemption doctrine did not preempt the state's power to "impose a parallel restriction."[85]

The Ninth Circuit Court of Appeals recently addressed the potential conflict between state and federal laws regarding weapon prohibition for domestic violence misdemeanants.[86] In *United States v. Brailey,* a defendant was convicted in Utah of a misdemeanor crime of violence, which, under that state's law, did not bar him from possessing a weapon.[87] Brailey argued that the federal law must give this state law "full effect," and therefore he could not be prosecuted under section 922(g)(9).[88] But

the Ninth Circuit held that federal law, not state law, controlled the right of a defendant to possess a weapon under a federal statute.[89] Because under federal law a conviction for a misdemeanor crime of domestic violence makes firearm possession a federal crime, Brailey was properly charged with violating the federal law. In effect, the state and federal laws were two independent provisions, and neither controlled the other's application.

As these cases illustrate, the differing state and federal laws on firearms do not pose a Supremacy Clause issue, because the federal law is not preempting state law.[90] Rather, the laws are "parallel restrictions," both of which remain applicable. If in a certain circumstance a defendant would be subject to firearm prohibition under federal law but not state law, the federal law does not supersede the state statute.[91] Both laws would, however, be applied to the situation, with the conclusion that the defendant would not be in violation of state law but would be violating federal law by possessing weapons.[92]

STATE FIREARMS LEGISLATION IN DOMESTIC VIOLENCE CASES

Considering the myriad issues that have arisen in implementation of the federal firearms laws, several states that do not already have similar gun laws have moved to enact them. Although domestic violence offenders are already subject to the federal law, state legislation makes it straightforward that the state courts must implement the law and thereby prevents resistant judges from failing to enforce firearms laws in domestic violence cases. In addition, states can enact laws that broaden the definitions of eligible parties, the terms in protection orders, and other elements that can make it easier to prosecute firearms cases under state law. Local law enforcement officials are most familiar with handling domestic violence cases and are also better able to enforce state laws on firearms.[93]

Yet the state laws vary tremendously on central issues—both from each other and from federal law.[94] For example, the laws differ on whether weapon seizure is mandatory or discretionary, on the authorized method for weapon seizure and weapon return, and on the definition of the "intimate relationship" that makes a party eligible for a protection order.[95] They also vary considerably on whether the weapons must have been used in the domestic violence incident in order to permit their seizure, on the amount of time provided to the state to petition for forfeiture of the weapons, and on the balance of the burden placed on law enforcement and the defendant regarding return of the weapons.[96]

RESISTANCE TO STATE FIREARMS LEGISLATION: PENNSYLVANIA AND DELAWARE

Several states have not passed any legislation on the issue. Perhaps not surprisingly, proposed state firearms laws in these states have met with significant resistance.[97] For instance, proposed legislation in Pennsylvania was designed to expand police authority to seize weapons, not only in situations where a protection order is issued after an incident involving use or threat of use of the weapon, but in *any* situation after issuance of a protection order. A national organization, Gun Owners of America, contested the legislation, arguing that the protection orders resulted from ex parte proceedings where the respondent had no due process right, and stated that "[e]ven in the Orwellian world of leftist feminism, where legislators do what they're told to do by the politically correct, the lack of fundamental due process embodied in this legislation is breathtaking."[98]

While some firearms legislation did ultimately pass in Delaware, proposed legislation to prohibit firearm possession for five years by anyone who was convicted of a domestic violence misdemeanor or who violated a protection-from-abuse order encountered years of resistance by gun rights advocates.[99] The proposed law was narrower in scope than its federal counterpart, which prohibits firearm possession permanently on conviction of a domestic violence misdemeanor. However, the Delaware State Sportsmen's Association argued that a cause-and-effect relationship should be shown between a protection order violation and the possession of a gun

that indicated a risk of violence before the gun could be seized.[100] Another bill that passed the Delaware Senate in 1998 would have made it a felony to violate a protection order that included a prohibition against firearm possession, but gun-rights groups derailed the bill in the House.[101]

STATE LEGISLATION MORE LIMITED THAN FEDERAL LAW: OKLAHOMA, MONTANA, AND OHIO

Much of the state legislation is considerably narrower than sections 922(g)(8) and (9). For example, Oklahoma law requires officers to seize a weapon in a domestic violence incident, but this requirement applies only "when such officer has probable cause to believe such weapon or instrument *has been used to commit an act of domestic abuse . . . provided an arrest is made, if possible, at the same time.*"[102] The statute also requires the prosecutor to file a notice of the seizure and forfeiture within 10 days, or the weapons must be returned.[103] Montana law mandates that an officer seize weapons when responding to a call relating to assault on a partner or family member, but only if they have been "used or threatened to be used in the alleged assault."[104] Similarly, Ohio law permits seizure of weapons in alleged incidents of domestic violence or of violating a protection order but limits the seizure to those weapons used or threatened to be used or brandished during or in connection with the incident.[105]

STATE LEGISLATION WITH DIFFERENT BOUNDARIES THAN FEDERAL LAW: NEW YORK

Some state laws are broader in some respects than the federal laws, though narrower in others. In New York, for example, criminal and family courts have the power to suspend or revoke a firearms license when either a temporary or a final protection order is issued.[106] The suspension of a firearms license is mandatory when the court issues a protection order if it finds that the defendant has previously failed to comply with a protection order and the failure involved infliction of serious physical injury, use or threat of use of a deadly weapon, or behavior constituting a violent felony offense.[107] The court also may suspend the defendant's firearms license when it finds a substantial risk that the defendant may use or threaten to use a firearm unlawfully against the person for whose protection the order is issued.[108]

The definition of *intimate relationship* in section 922(g)(8) is quite narrow and does not include, for example, partners who have never lived together.[109] But in New York the state firearms laws apply to protection orders obtained in either family or criminal court and can include a broader definition of *relationship.*[110] On the other hand, New York has no law comparable to the prohibition on firearm possession for a person convicted of a misdemeanor crime of domestic violence in section 922(g)(9).[111] Some differences may also be noted between the federal and state laws in the weapons included in the definition of *firearms.*[112] In addition, impoundment of a weapon when a protection order is issued is discretionary under New York law, while such prohibition is mandatory under the federal statute if all the statutory elements are met for a qualifying protection order.[113]

STATE LEGISLATION MORE COMPREHENSIVE THAN FEDERAL LAW: NEW JERSEY AND ARIZONA

One of the most comprehensive firearms laws relating to domestic violence was passed in New Jersey. Under that state's Prevention of Domestic Violence Act, a court may issue a search warrant for weapons to accompany an ex parte temporary protection order, and a warrant form is a physical part of the temporary protection order form.[114] The law also provides a detailed procedure for forfeiture after weapons have been seized following issuance of a domestic violence protection order prohibiting such weapons. Prosecutors must petition within 45 days to obtain title to the weapons or revoke all licenses and permits for them, on the ground that "the owner is unfit or . . . poses a threat to the public in general or a person or persons in particular."[115] If the prosecutor fails to act within the required 45 days the weapons

must be returned.[116] The statute requires that after the hearing to determine title, the court "shall order the return" of the weapons in one of the following circumstances: (1) when the complaint has been dismissed at the victim's request and the prosecutor has determined that there is insufficient probable cause to indict, (2) if the defendant is found not guilty of the charges, or (3) if the court determines that the domestic violence situation no longer exists.[117]

Arizona's law also provides a detailed mechanism to seize weapons from a defendant in a domestic violence case.[118] At the scene of a domestic violence incident, a law enforcement officer may question anyone present to determine if there are firearms on the premises.[119] The statute then provides that "[u]pon learning or observing that a firearm is present on the premises, the peace officer may temporarily seize the firearm if the firearm is in plain view or was found pursuant to a consent to search and if the officer reasonably believes that the firearm would expose the victim or another person in the household to a risk of serious bodily injury or death."[120] The weapons must be held for at least 72 hours, and the victim must be notified before the firearms are released.[121] The statute also provides a procedure to retain the firearms if there is reasonable cause to believe that returning them may endanger the victim, the person who reported the incident, or others in the household.[122]

THE EVOLUTION OF STATE LEGISLATION: CALIFORNIA

The law in California has seen significant developments on this issue over the past several years. In 1990, the state Legislature passed an act that prevented a person who was the subject of a domestic violence protective order from purchasing or obtaining a gun.[123] But the law did not address confiscation of firearms already owned or possessed by the subject of the order.[124] In 1994, new legislation passed that attempted to remedy this gap and included a section on removing firearms from domestic violence abusers subject to restraining orders.[125] Under that law, at the hearing when a protective order was issued, the judge could also order surrender of firearms to the local police station, but only if the victim proved by a preponderance of the evidence that the defendant had a likelihood of using, displaying, or threatening to use a firearm in a future act of violence against the victim.[126] This was often difficult to prove, as information about the use or threat of use of a firearm was not routinely noted in police reports.[127] Judges also had the discretion to limit the gun restriction to a shorter period.[128] As one author stated, before passage of the Domestic Violence Prevention Act, "unless clear and convincing evidence existed that the offender would act violently in the future, courts remained reluctant to confiscate guns from domestic violence offenders."[129]

In 1999, domestic violence law enforcement was strengthened and assistance to victims was broadened[130] when the state amended the Domestic Violence Prevention Act, a 1993 law that consolidated a number of statutes that had been duplicated in various parts of California law.[131] Its firearms section was specifically drafted to be consistent with the federal provisions under 18 U.S.C. § 922(g)(8).[132] The 1999 law makes it illegal to possess, purchase, or receive a firearm while subject to a restraining order and requires the court to notify a defendant that such acts will violate the terms of the order.[133] The law no longer requires the court to issue a separate order regarding firearms, based on a finding that firearm use or threat of firearm use in future violence is likely.[134] Instead it eliminates the court's discretion on the issue and makes mandatory the relinquishment of all firearms.[135] Nor may the judge determine the length of time that the weapons must be confiscated: the time period is automatically equal to the period for which the protective order remains effective.[136]

The 1999 law also provided a procedure for relinquishing weapons. If the respondent is present at the protective order hearing, he or she must immediately relinquish any firearms possessed and has 24 hours to relinquish any other firearms, either by turning them in to local law enforcement or by selling them to a licensed dealer.[137] Within 72 hours of receiving

the order, the respondent must file a receipt with the court that proves that any firearms were either relinquished to police or sold.[138] Local law enforcement may also charge a storage fee for the weapons.[139]

When the protective order expires, the 1999 law requires law enforcement to return the weapons to the respondent within five days, unless the court finds that a firearm was stolen, the respondent is prohibited from gun ownership for other reasons, or a new protective order has been issued.[140] The court may exempt a specific weapon from the relinquishment requirement if the respondent can show that a particular weapon is necessary for his or her employment.[141]

California law also requires that a law enforcement officer take temporary custody of any firearm discovered in plain view or during a consensual or warranted search at the scene of a domestic violence incident involving a threat to human life or a physical assault, as necessary to protect the officer or other persons present.[142] The officer must provide the owner with a receipt that lists and provides identifying information about the firearms and notes the time and place that the weapons can be recovered.[143] Unless a weapon is being held for use as evidence, was possessed illegally, or is retained pending a decision by the court as to whether the weapon should be returned, the police must make the weapon available to the owner or possessor within 48 hours to 5 business days after its seizure.[144] If law enforcement has reasonable cause to believe that the return of the weapon is "likely to endanger the victim or person reporting the threat or assault," the law enforcement agency can petition the court within 60 days to determine whether the weapon should be returned.[145] The law enforcement agency must notify the person who originally possessed the weapon about the court proceeding, and, if he or she fails to respond, the court will issue an order forfeiting the weapon.[146] If the person desires a hearing on the issue, the case must be heard within 30 days of the request.[147] The court must order a return of the weapon unless it is shown by a preponderance of the evidence that the weapon's return would endanger the victim or the person reporting the assault or threat.[148] If the court does not return the weapon, the original possessor or owner has one year to petition for a second hearing.[149] At that hearing, barring clear and convincing evidence that the return would endanger the victim or person reporting the assault or threat, the court must order the weapon to be returned.[150] If there is no second hearing or it is unsuccessful, the weapon may be disposed of.[151]

While some states have begun to enact detailed firearms laws pertaining to domestic violence, most have laws more limited than the federal law or have no laws in this area. At least for the time being, we cannot rely on state laws to address the critical problem of abusers' access to firearms. States must enforce and implement the federal firearms laws if those laws are to achieve their purpose of promoting the safety of victims of domestic violence.

PROCEDURAL ISSUES IN IMPLEMENTATION OF FIREARMS LAWS

A number of procedural issues have challenged the successful implementation of firearms law, including procedures for weapon search and seizure—both at the scene of an incident of domestic violence and when a domestic violence protection order is in place—and procedures for the return of weapons. A brief review of some legal challenges to firearms laws based on those procedural issues is instructive.

WEAPON SEARCHES AND SEIZURES IN DOMESTIC VIOLENCE CASES

There is significant debate over whether a warrant is necessary to search for and seize weapons after a defendant either has been convicted of a misdemeanor domestic violence crime or is subject to a protection order, as well as what standard of suspicion, if any, is necessary for a "reasonable" search under the Constitution. This issue arises in two situations: in a criminal context, when an officer is at the scene of a domestic violence incident, and in a civil context, when a protection order is issued.

Weapon Searches and Seizures at the Scene of a Domestic Violence Crime

In New Jersey, the Prevention of Domestic Violence Act permits a law enforcement officer to seize weapons when there is probable cause to believe that an act of domestic violence has been committed in the following circumstances:

> (1) In addition to a law enforcement officer's authority to seize any weapon that is contraband, evidence or an instrumentality of crime, a law enforcement officer who has probable cause to believe that an act of domestic violence has been committed may:
>
> (a) question persons present to determine whether there are weapons on the premises; and
>
> (b) upon observing or learning that a weapon is present on the premises, seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury.
>
> (2) A law enforcement officer shall deliver all weapons seized pursuant to this section to the county prosecutor and shall append an inventory of all seized weapons to the domestic violence report.[152]

The statute authorizes a warrantless search for weapons once the officer has probable cause to believe that an act of domestic violence has occurred. The weapons need not have been used in the crime or illegally possessed. Nor is it clear whether the officer must have probable cause to believe weapons are present before beginning a search. Once the officer "observes or learns" that a weapon is present, the officer may seize it on reasonable belief that it would put the victim at risk of serious bodily injury.

The courts have considered whether this type of search and seizure is constitutional under the Fourth Amendment. The New Jersey appellate court has held that the law *is* constitutional because it is "undertaken to promote legitimate state interests unrelated to the acquisition of evidence of criminality or in furtherance of a criminal prosecution."[153] This is what the U.S. Supreme Court has termed "special needs" searches; because they are not conducted for the purpose of a criminal prosecution, they need not meet the usual standards of a warrant and probable cause. These searches are still subject to the Fourth Amendment, but they must only be "reasonable" in order to be constitutional.

The New Jersey court noted that the language of the statute distinguishes this type of search from a criminally focused search, stating that it is "in addition to a law enforcement officer's authority to seize any weapons that are contraband, evidence or an instrumentality of crime."[154] Here, the state's interest in seizing the weapons is to ensure the safety of domestic violence victims, so search and seizure are reasonable, though law enforcement had neither a warrant nor probable cause to conduct the weapons search.[155]

In *State v. Perkins,*[156] another New Jersey appellate case, officers responded to a 911 call from a woman who said that her husband had hit her in the head with the telephone, that he had been drinking, and that he had a lot of weapons in the home.[157] When the officers arrived, they saw the victim, who was visibly upset and had a red mark on the right side of her face. They located the defendant, who confirmed the wife's story. The officers then conducted a search of the house, where they found multiple firearms, as well as ammunition and other weapons, which they seized.[158]

The court found that the 911 call, the demeanor of the victim, and the mark on her face gave the officers probable cause to believe that the defendant had committed an act of domestic violence.[159] They also had "reasonable cause" to believe, first, that the defendant had access to weapons, based on the 911 call and, second, that the weapons posed a "heightened risk of injury to the victim."[160] The court specifically noted that finding risk of injury did not require proof that the defendant had used or threatened to use a weapon against the victim; the focus was on the threat of future use: "[T]he absence of the use or threatened use of a weapon is not necessarily a useful barometer or predictor of future behavior

vis-à-vis the future use of weapons by a defendant against the victim."[161] The court also found that the officers acted reasonably, by searching only the areas of the home where the victim informed them that weapons might be found.[162] The court stated that "like any special needs search, [the search for weapons under the act] is not based upon suspicion that a crime has been committed, but instead countenanced by a State interest, civil in nature, to protect potential victims, thereby going beyond the normal purview of law enforcement."[163]

By contrast, the Pennsylvania Supreme Court has held that the state statute mandating the seizure of weapons used in certain domestic violence offenses does not authorize a warrantless search for such weapons.[164] In *Commonwealth v. Wright,*[165] police responded to the home of the defendant after receiving a report that he had shot his wife.[166] The police entered the residence, arrested the defendant, and proceeded to search the home without a warrant. Two weapons, one of them the weapon used in the shooting, were found during the search.[167] The trial court denied the defendant's motion to suppress the weapons, holding that the state statute involving confiscation of weapons used in domestic violence offenses required seizure of all weapons used by the defendant.[168]

But the Pennsylvania Supreme Court observed that, because the statute involves weapon seizure but does not address *the means that may be used* to locate the weapons,[169] the search for weapons must meet either the usual Fourth Amendment requirement of a warrant or one of the recognized exceptions to a warrant.[170] Because there was no warrant and the court found that the search was not justified by exigent circumstances, consent, or as a search conducted incidental to arrest,[171] it held that the weapons should have been suppressed and remanded the case for a new trial.[172]

The Hawai'i Supreme Court reached a similar conclusion, ruling that a state statute authorizing seizure of firearms in domestic violence situations does not permit warrantless searches.[173] The relevant Hawai'i statute states that

> (4) Any police officer *with or without a warrant,* may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of whether the physical abuse or harm occurred in the officer's presence:
>
> ....
>
> (f) The officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.[174]

First the court found that the statute, which concerned seizure, did not apply to searches. Moreover, the court noted that the statute "may not be executed at the expense of [the defendant's] constitutional right against unreasonable searches and seizures."[175] It found that a warrantless search of a mattress, which met no recognized exception to the warrant requirement, was unconstitutional and that the gun evidence obtained must be suppressed.[176]

Weapon Searches and Seizures Under a Domestic Violence Protection Order

New Jersey also authorizes weapon searches and seizures in a civil context after a protection order has been issued. As part of a temporary ex parte restraining order, the court may forbid the defendant from possessing any firearm, and it may further order "the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located."[177] If a final restraining order is issued, the firearm prohibition becomes mandatory.[178] At the hearing for the final order the judge may also order the search for and seizure of the firearms under this provision, again "at any location where the judge has reasonable cause to believe the weapon is located."[179]

New Jersey's case law regarding weapon searches and seizures under the terms of a civil protection order is consistent with its court rulings regarding these searches and seizures in the criminal context. In *State v. Johnson,*[180] the state appellate court considered the

constitutionality of a warrant to search for firearms issued under the temporary restraining order statute.[181] The court again found that this type of search is subject to the restrictions of the Fourth Amendment, but because the purpose of the warrant was to protect the domestic violence victim from further violence, and not to discover criminal evidence, the warrant did not need to meet a probable cause standard. Instead, "to support issuance of a search warrant pursuant to [the temporary restraining order statute], the judge must find there exists reasonable cause to believe that, (1) the defendant has committed an act of domestic violence, (2) the defendant possesses or has access to a firearm or other weapon . . . and (3) the defendant's possession or access to the weapon poses a heightened risk of injury to the victim."[182]

Juxtaposed with other states, Pennsylvania may have made a distinction between searches and seizures in the criminal and civil context. In a case after its Supreme Court decided *Commonwealth v. Wright,* a lower court ruled, in *Kelly v. Mueller,* that a judge had authority to order a warrantless search and seizure of guns in a protection order context.[183] The defendant did not appear at the hearing for a final protection order; the plaintiff testified that the defendant had threatened to kill her while pointing at her a loaded handgun owned by his father. She also listed several weapons kept in the defendant's home.[184]

The court entered an order requiring the defendant to surrender all weapons he had used or threatened to use in an act of abuse against the plaintiff, and it identified all such weapons. But when a sheriff went to the defendant's home to retrieve the weapons listed in the order, the defendant signed a statement saying there were no weapons.[185] The plaintiff returned to court the same day to request a supplemental order, testifying that she had seen weapons in the defendant's home. So the court entered an order directing the sheriff to search both the defendant's residence and the father's hunting cabin.[186] The order also directed the sheriff to seize any weapons and use whatever force necessary to enforce the order.[187]

The defendant argued that the court had no authority to issue search-and-seizure orders under the protection order statute, which discussed only relinquishment and not seizure of weapons.[188] The court agreed that the relinquishment provision did not grant the court authority to order search and seizure of the weapons but found that the trial judge was justified in believing that the plaintiff was in serious danger based on the defendant's threats to use the weapons against her.[189] Therefore the court concluded that "the law as expressed . . . is sufficiently explicit and broad to deal with weapons, once adequately described under oath, to the same degree that an affidavit of probable cause would have been permissible to authorize a search and seizure."[190] The search-and-seizure order was within the "general intent" of the statute to confiscate the weapons.[191]

Still, this is only a single case, and the Pennsylvania Supreme Court has not yet ruled on the issue of searches and seizures of weapons in the protection order context. Moreover, the *Kelly* decision has been highly controversial.[192]

PROCEDURES FOR THE RETURN OF WEAPONS

Disputes have arisen in jurisdictions across the country on the procedures and responsibilities of law enforcement personnel for returning weapons seized either during a domestic violence incident or while a domestic violence protection order was in effect.

Often there is simply no procedure in place and confusion abounds over the proper means to handle return of weapons. In an Ohio case, *Golden v. Bay Village Police Dep't,*[193] law enforcement had confiscated 14 weapons from the plaintiff's home, under a temporary protection order issued in connection with an allegation of criminal domestic violence. A few months later the order was dissolved when the criminal charge was dismissed, and Golden subsequently demanded that the police department return his weapons.[194] The police department told him that he would need a directive from the chief of police for release of the weapons, so he wrote a letter requesting such a directive. In response, the police chief

told Golden that he would need to file an action for replevin[195] and obtain a court order.[196]

Golden took no immediate action, but when police informed him a few months later that his weapons would be destroyed unless he filed an action for replevin, he did so. At a pretrial hearing, the police department agreed to an order returning the weapons to Golden, and the magistrate granted the replevin order.[197]

In *Golden,* the Ohio appellate court considered whether an award of attorney fees to Golden was in order on the ground that the police department's failure to return the weapons to him after his criminal charges were dismissed was in bad faith.[198] The appellate court rejected the request for fees, finding that "at all times, the onus was on Golden to seek the necessary court order for the release of his property."[199] According to the court, because the police seized the weapons under court order, it was reasonable for them not to return the property except by court order, and the dissolution of the temporary protection order was not relevant.[200] The court also noted that Golden could have requested such a court order at the time the temporary protection order was dissolved. Because he had failed to do that and the criminal case had already been dismissed, the replevin action suggested by police was a reasonable alternative.[201]

The actual procedures necessary for the search, seizure, and return of firearms in domestic violence situations, as well as the legal standards required for these processes, are only now beginning to be developed among the states. Moreover, the limited case law available demonstrates a focus on enforcement of state laws rather than federal firearms laws. States definitely need to enact legislation that provides clear standards and protocols for implementing both the federal and any state firearms laws. Without the guidance of such legislation, the correct method for implementation of these laws remains uncertain, and, unfortunately, the uncertainty constrains jurisdictions from attempting any implementation at all.

RECOMMENDATIONS FOR EFFECTIVE ENFORCEMENT OF FEDERAL AND STATE FIREARMS LAWS

Review of both the state and federal legislation and case law on its implementation gives guidance on how to provide effective enforcement of the state and federal firearms laws. The following recommendations derive from the above review.

1. Draft domestic violence protection order forms to conform to federal requirements under section 922(g)(8).

Protection order forms that track the federal requirements serve at least two critical functions. First, if a violation of section 922(g)(8) is alleged, it will be easy to ascertain whether the protection order meets the requirements of the federal statute and facilitates prosecution. Currently, while many orders do meet the requirements, this can only be discovered through close reading of the order, any court records from the case, and the petition. Second, an order tracking federal language and clearly demonstrating eligibility under the federal firearms laws enables it to be entered accurately into the national protection order registry. Those orders meeting the requirements receive a "Brady Indicator."[202] All gun dealers are required to submit identifying information about each potential gun purchaser to a national database maintained by the FBI. Any orders bearing a Brady Indicator trigger a finding that the potential purchaser is not eligible to purchase a weapon.[203] Conversely, without this indicator there is no such response. Therefore, amending the forms to facilitate both the notation of pertinent criteria and the accurate entry of data into the database is an important first step toward improving enforcement of the federal firearms law.

For example, Pennsylvania has changed its standard protection order form by tracking the federal statute's language, adding the criteria that establish a qualifying domestic violence protection order for purposes of federal law section 922(g)(8).[204] The state's judges now can easily indicate on the form whether the criteria have been met, which then

makes it clear whether or not firearm possession is prohibited under federal law.[205]

2. Provide notification on all protection orders that firearm possession may violate federal law and any relevant state law.

Although notification on protection orders that firearm possession may violate federal law is not required for the law to be effective, it can be helpful for several reasons. It prevents any later argument that the defendant was ignorant of the law. And, as above, it facilitates later federal prosecution of a violation of the federal law, as well as accurate entry into the national registry. Furthermore, for full-faith-and-credit purposes, it alerts law enforcement in other states that the order is subject to the federal firearms laws. Many states already have language on their protection order forms noting that the orders are entitled to full faith and credit in all other states. Language concerning federal firearms laws could be added to strengthen enforcement of the federal law.

3. At a hearing on the protection order, the judge should inquire if the respondent has firearms. And, where authorized under state law, a clause prohibiting weapons should be included on the protection order form.

If there are firearms, the judge can arrange for their surrender under the procedure described below and can take the opportunity to inform the defendant of the federal law. If state law authorizes making a weapons ban a direct term of a protection order, this should be done. If the defendant remains in possession of any weapons after issuance of such an order, he or she will then be in violation of both the federal law and any state firearms law, as well as the protection order under state law, which may impose a more severe penalty than a state firearms law alone. If state law authorizes a weapons ban on an ex parte order, the judge should make the firearms inquiry at both an ex parte hearing and a final order hearing.

4. Courts should not order diversion programs, deferred sentencing, or any other process that fails to result in the recording of a misdemeanor domestic violence conviction.

For a number of reasons, diversion programs and other sentencing models that ultimately result in dismissals of domestic violence convictions are not recommended.[206] This is particularly relevant in the context of firearms laws, because without a domestic violence misdemeanor conviction on the record, section 922(g)(9) will not apply. Although abusers without the recorded conviction may be guilty of the same behavior as those with the record, they will not be subject to the federal weapons prohibition.

5. Develop a specific and detailed procedure for the surrender, storage, and return of all firearms. This includes designating specific personnel at each involved agency to be responsible for these tasks, as well as developing forms to ensure a "paper trail" of the handling of all weapons.

After an order to surrender firearms is issued, often little follow-up is done to determine whether the weapons were actually relinquished.[207] The development of a protocol for the handling of firearms is essential, so that court orders for weapon surrender are enforced, weapons are accounted for, and the procedure for weapon return is both clear and effective. Designating personnel in each agency strengthens the likelihood that procedures will be followed and also enables a partnership to help hold agencies accountable for performing their assigned roles.

While developing a detailed protocol can be daunting, some models do exist. The Domestic Violence Division of the Circuit Court in Miami–Dade County, Florida, has one of the most developed protocols for the handling of firearms.[208] At every protection order calendar, the bailiff gives each respondent a form, "The Respondent's Sworn Statement of Possession of Firearms and/or Ammunition," before the respondent has been heard. The form is available in Spanish and Creole, in addition to English, and clearly states that "[i]f a Respondent remains in possession of a firearm or ammunition after a Final Judgment of Injunction is entered he or she would be in violation of 18 U.S.C. § 922(g)(8), which is punishable by a maximum of ten (10) years imprisonment and or a $250,000.00 fine." Court personnel collect the form and provide it to the judge with the court file when the case is called.

The judge then makes an "on-record" inquiry of each respondent concerning the form, to verify relevant information such as the current status of weapons. The judge may issue an order to surrender firearms, which is handed to the respondent at the conclusion of the hearing.[209] The order includes detailed instructions to the respondent on surrendering the weapons at the local police station, obtaining a receipt, and faxing this documentation to the court within 24 hours of the order's issuance.[210] The court also provides a detailed information sheet that includes the federal laws against firearm possession when a permanent injunction is in effect or when a person has been convicted of a misdemeanor crime of domestic violence.

The case manager, a court employee at the Miami domestic violence court, is responsible for monitoring the respondent's compliance with the order and for providing proof of surrender. The procedures direct the case manager to maintain a firearms surrender log book for this purpose, and in the event of noncompliance the case manager notifies the judge, who issues an "Order to Show Cause Why Respondent Failed to Surrender Firearms and/or Ammunition," which orders the respondent to appear at a particular time at the court for a hearing on the issue.

The information sheet provided to respondents also explains court procedures on the return of firearms or ammunition if the protection order is no longer in effect.[211] In this situation, the respondent must either file a motion or write a letter to the court that includes the weapons' identifying information, a copy of the bills of sale evidencing the respondent's ownership of the weapons, and a signed affidavit providing all relevant information. If the judge determines that the weapons should be returned, he or she will enter a court order providing for their return. A copy of this order is sent to the petitioner. If the judge determines that there is no a legal basis for return of the weapons, the court will set a hearing on request.

If the respondent receives a court order providing for the return of the weapons, he or she can take the order, together with the police property receipt, and proofs of ownership, to the police station where the weapons are stored. The information sheet notes that some police department policies require that weapons and ammunition not be returned at the same time, for safety reasons. Unless the owner claims the surrendered weapons within eight months of receipt of the court order providing for their return, the weapons are forfeited to the state and there can be no further action for their recovery.

King County, Washington, also has developed specific procedures to improve enforcement of firearms laws. Since 1993, Washington State has had laws that prohibit people convicted of certain domestic violence misdemeanors—including assault, stalking, coercion, and violating a no-contact order—from possessing a firearm, and that require law enforcement agencies to seize weapons from such domestic violence perpetrators.[212] But initially the laws were not widely implemented, because there was neither a procedure for enforcement nor sufficient financial resources provided to local law enforcement to implement the laws.[213] Courts did not issue weapon surrender orders consistently, the justice system did little follow-up to hold defendants accountable, and agencies lacked the facilities to store the surrendered weapons.[214]

But in 2003, judges from the district court and the King County Sheriff's Office initiated a firearm forfeiture program to improve enforcement of the state law.[215] The program developed a form for the sheriff's office that provides deputies with a detailed procedure to follow when removing weapons in domestic violence cases.[216] The deputies must attempt to determine if an existing protection order is in effect. Because the federal law bars the subject of a valid protection order from possessing a firearm, the deputies can remove any weapon found when an order is in effect.[217] If there is no existing order, the deputies record identifying information about weapons available to the suspect.[218] This record provides the prosecutor with information to present in court later about the defendant's ability to access weapons.[219] Under the new program, judges who are presented with this information may even order defendants to surrender weapons as a condition of bail.[220]

The sheriff's office now designates a particular officer to handle all surrendered weapons. This officer follows a specific procedure for recording and storing the weapons so that they can be identified and accessed quickly.[221]

In Seattle, the municipal court has also effected the changes in policy regarding weapon surrender.[222] The court's probation unit routinely screens defendants jailed on misdemeanor charges and now notes those who are arrested for domestic violence crimes.[223] The screeners check for existing protection orders against defendants and ask about firearms. They then relay this information to municipal court commissioners, who can order the surrender of weapons.[224]

In New York State, when the court orders the surrender of firearms, the order of protection must specify the date, time, and location where they must be surrendered and also must direct the authority receiving the firearms to immediately notify the court of the surrender.[225] The law also includes directives for notification of local law enforcement by the court when an order has been issued for surrender of firearms or ineligibility for license.[226] In addition, the court must notify the statewide registry of protection orders.[227]

As this description of sample protocols demonstrates, development of an effective firearms protocol must involve, at a minimum, judges, courtroom personnel, and all local law enforcement agencies, along with prosecutors and defense counsel. An effective protocol is also very detailed, so that the respondent knows precisely what steps he or she must take to comply with the law. Numerous practical considerations must be dealt with, such as determination of available storage space for the weapons and designation of police and court personnel to perform specific tasks.

It is critical that the protocol include personnel responsible for monitoring the defendant's compliance with the process and notifying the judge about noncompliance to enable quick and consistent follow-up.

6. Local prosecutors and law enforcement should reach out to federal counterparts in their jurisdiction to discuss specific methods of coordinating the investigation, enforcement, and prosecution of firearms crimes in domestic violence cases.

In many jurisdictions, a chasm seems to separate state and federal justice agencies. They may have little need for interaction and tend by habit to enforce and prosecute the law independently of one another. In some jurisdictions, some rapprochement has already occurred between the two systems, owing to other federal criminal laws enacted under the Violence Against Women Act, including interstate stalking, interstate violation of a protection order, and interstate domestic violence. The U.S. Department of Justice has also required each U.S. Attorney's Office to designate a specific prosecutor to handle VAWA crimes and act as liaison with state prosecutors. Yet the impact of these changes on improved federal-state coordination and communication remains to be proven.

This kind of coordination in firearms cases is critical, for two reasons. First, the federal firearms laws depend on state law predicates—protection orders or misdemeanor convictions—to be enforceable. Second, as more states develop their own laws on firearms and domestic violence, the potential for conflicts in prosecution becomes greater. While, technically, both a state and a federal prosecution can proceed simultaneously, in practice this is often a waste of time and resources.[228]

One project to encourage this kind of federal-state coordination has gained national attention. Although it is not focused specifically on domestic violence cases, it may provide some lessons for such coordination in the domestic violence area.

In 1997, Richmond, Virginia, initiated Project Exile, a partnership among federal, state, and local prosecutors and law enforcement agencies to coordinate prosecution of illegal gun possession or use.[229] The goal of the project is to reduce gun violence by encouraging federal prosecution of firearms charges where possible.[230] Under the project, Richmond police officers receive special training to identify state firearm violations that also can be charged as federal crimes.[231] When an arrest is made by local police on state firearms charges that could be charged feder-

ally, the local police immediately notify a designated agent from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives. Federal and state law enforcement work together to determine whether it is an appropriate case for federal prosecution, and, if so, they refer it to the U.S. Attorney's Office.[232] If the federal prosecutor is able to obtain an indictment on the federal charge, the Commonwealth's Attorney voluntarily drops the state charges.[233]

Project Exile focuses on three groups of firearms law violators: felons, drug offenders, and domestic violence offenders.[234] The project imposes tough penalties for violations, such as a mandatory federal prison sentence of several years served at out-of-state facilities.[235] The project also included a widespread publicity campaign to deter would-be violators while gaining the support of the community.[236] Project Exile was expanded statewide in Virginia and has now been adopted in several cities in other states.[237] The U.S. Department of Justice has also become an official supporter of the project and has instituted grants to fund development of similar projects around the country.[238] Its proponents argue that Project Exile has resulted in a significant drop in homicide rates.[239]

The project has been controversial. Some argue that the project is "overenforcing" firearms laws, giving defendants significantly more severe sanctions than they would receive under state law. There have also been legal challenges contending that the federal-state alliance of Project Exile infringes on a state's sovereignty in enforcing its own laws.[240] These challenges have been unsuccessful, yet they do demonstrate some resistance on both the state and federal sides to this type of coordination. In dicta, a federal district court criticized state law enforcement authorities for their involvement in Project Exile, arguing that these charges could be brought under state law; "[h]owever, instead of bringing the resources of the Commonwealth to bear, local authorities have abdicated their responsibility to the federal government."[241]

Despite all the objections, Project Exile incorporates important strategies that could be useful in enforcement of the federal firearms laws in the arena of domestic violence. Law enforcement personnel have developed a paging system so a designated federal law enforcement officer can immediately confer on the appropriateness of a federal charge. At least one state Commonwealth's Attorney has been cross-designated as a federal prosecutor to prosecute these cases, and additional federal prosecutors have been assigned to the project. A publicity campaign has also improved public awareness of the problem while helping to create an atmosphere of "zero tolerance" for firearms offenders.

7. Mandate judicial training specifically on firearms and domestic violence, federal firearms laws, and any state firearms laws.

The importance of training judges in domestic violence issues has become a familiar mantra, because the judicial role is so central to any domestic violence justice initiative. After strenuous efforts across the country over several years, the knowledge, sensitivity, and effectiveness of judges who handle domestic violence cases have improved. The intersection of domestic violence and firearm possession, however, appears to be one in which significant confusion or resistance remains on the part of judges. Many court systems now have mandatory domestic violence training for the judiciary. This topic should be a high priority for training and can also be combined with related issues, such as full faith and credit, the national registry on protection orders, and other federal domestic violence laws.

8. Investigate the development of specialized or integrated domestic violence court models.

The recommendations to improve firearms law enforcement can be implemented in any justice system. But a specialized domestic violence court will facilitate these initiatives perhaps more expeditiously and effectively.[242] As a basic matter, such specialized courts maintain a well-developed justice partnership, having created strong working relationships with all key justice players, including law enforcement agencies, prosecutors, the defense bar, probation officials,

and pretrial release officials. Specific personnel from the court and several agencies are often designated to the specialized court, so that they can focus entirely on domestic violence cases and so that they will be both experienced and knowledgeable about domestic violence issues. Moreover, the concentration of domestic violence cases in one court makes it easier to track any firearm surrender protocols and to monitor for violations. An integrated domestic violence court, which handles both protection order cases as well as domestic violence misdemeanors, will have easy access to information on the underlying state predicates for federal firearms laws.

CONCLUSION

The states are increasingly becoming aware of the necessity to remove firearms from domestic violence perpetrators. However, the local firearms laws that do exist vary in their clarity and comprehensiveness, even as methods for their enforcement remain confusing. Worse yet, many jurisdictions have no enforcement procedures in place.

In many ways this situation is similar to the one that existed after Congress enacted a provision in the Violence Against Women Act that required each jurisdiction to give full faith and credit to domestic violence protection orders from other jurisdictions. The law was passed without any direction about its implementation, and for some years many states failed to address it. However, the federal government eventually recognized its failure to provide guidance, and by the late 1990s federally funded training and regional conferences became available to help the states enforce the full-faith-and-credit provision. Clear informational pamphlets for targeted audiences, such as law enforcement officials and victim advocates, were developed to assist these groups in understanding and implementing the law. A National Center on Full Faith and Credit was created with federal funds to focus entirely on providing training and technical assistance on the provision's enforcement, including development of model implementation statutes to guide states in enacting such legislation.

This same kind of effort is required for implementation of the federal firearms laws relating to domestic violence. While certainly the federal government has funded and promoted some training on this issue, most of the training has merely explained the laws, not assisted on the issue of enforcing them. There has not yet been the strong focus required for broad state implementation. The firearms laws present many of the same complexities generated by the full-faith-and-credit law, such as confusion over the correct legal standards, the existence of several practical obstacles to enforcement, and the need for federal and state officials to coordinate their efforts. Model state implementation laws, intensive and practical training, and targeted conferences devoted to enforcement of the laws are needed. These efforts should include gatherings that bring together federal and state prosecutors and law enforcement leaders to discuss their concerns and how best to coordinate efforts. Judicial training is required on the definition of federal terms and the federal requirements for the predicate crimes and protection orders necessary to trigger the firearms laws. Effective legislation and procedures from states that have moved forward in this area should be shared with other states. Local jurisdictions, too, bear the responsibility of educating their judiciary and law enforcement personnel about the importance of enforcing the firearms laws and of bringing together the requisite agencies to develop a clear and effective implementation plan.

Unquestionably, the seizure of weapons in domestic violence cases raises a set of difficult and complex issues. Yet the lethal mix of batterers and firearms is too critical for jurisdictions to avoid. Both the states and the federal government have an obligation to confront and solve the confounding challenges of gun seizure.

NOTES

1. *Holes in System: Abusers Are Supposed to Surrender Firearms,* San Diego Trib., Apr. 6, 2004, at B6.

2. N.Y. State Comm'n on Domestic Violence Fatalities, Report to the Governor 16 (1997).

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3. Hector Castro, *County Moves to Seize Guns in Domestic Violence Cases,* Seattle Post-Intelligencer, Mar. 16, 2004.

4. Bureau of Justice Statistics, U.S. Dep't of Justice, Homicide Trends in the U.S.: "Intimate Homicide," *available at* www.ojp.usdoj.gov/bjs/homicide/intimates.htm. This figure is from the period between 1990 and 2002. *Id.*

5. *Legislator Calls for Study of Gun Seizures,* Union Leader (Manchester, N.H.), Jan. 2, 2005, at A18 (quoting Henniker, N.H., Police Chief Timothy Russell).

6. 18 U.S.C. § 922(g)(8) (2000).

7. 18 U.S.C. § 922(g)(8)(A).

8. 18 U.S.C. § 922(g)(8)(B).

9. 18 U.S.C. § 922(g)(8)(C).

10. 18 U.S.C. § 921(a)(32).

11. 18 U.S.C. § 925(a)(1).

12. 18 U.S.C. § 922(g)(9) ("[I]t shall be unlawful for any person . . . who has been convicted . . . of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm or ammunition . . . ." *Id.* This provision is commonly known as the Lautenberg Amendment to the Gun Control Act of 1968. The amendment is named after Senator Frank Lautenberg of New Jersey, the bill's leading sponsor).

13. 18 U.S.C. § 922(g)(1).

14. Jason M. Fritz, Comment, *Unintended Consequences: Why Congress Tossed the Military Family Out of the Frying Pan and Into the Fire When It Enacted the Lautenberg Amendment to the Gun Control Act of 1968,* 2004 Wis. L. Rev. 157, 165.

15. 18 U.S.C. § 921(a)(33)(B)(i)(I).

16. 18 U.S.C. §§ 921(a)(33)(A)(ii), 922(g)(9).

17. In some limited circumstances the firearm ban may be lifted, such as when the conviction is "expunged or set aside" or the defendant has been pardoned for the offense or has had his civil rights restored. 18 U.S.C. § 921(a)(33)(B)(ii).

18. *See, e.g.,* United States v. Lewitzke, 176 F.3d 1022, 1024 (7th Cir. 1999); United States v. Barnes, 295 F.3d 1354, 1368 (D.C. Cir. 2002); United States v. Hancock, 231 F.3d 565–67 (9th Cir. 2000); United States v. Smith, 171 F.3d 617, 623–26 (8th Cir. 1999).

19. *See, e.g.,* United States v. Mitchell, 209 F.3d 319, 323–24 (4th Cir. 2000); United States v. Napier, 233 F.3d 394 (6th Cir. 2000) (holding that section 922(g)(8) does not violate the Commerce Clause or the Due Process Clause); United States v. Hemmings, 258 F.3d 587, 594 (7th Cir. 2001); United States v. Pfeifer, 371 F.3d 430, 436–37 (8th Cir. 2004).

20. United States v. Morrison, 529 U.S. 598 (2000).

21. *See, e.g.,* United States v. Gallimore, 247 F.3d 134, 138 (4th Cir. 2001); United States v. Pierson, 139 F.3d 501 (5th Cir. 1998) (finding section 922(g)(8) constitutional under the Commerce Clause); *Napier,* 233 F.3d at 399, 402 (holding that section 922(g)(8) does not violate the Commerce Clause or the Due Process Clause); United States v. Wilson, 159 F.3d 280, 284–89 (7th Cir. 1998) (holding that section 922(g)(8) is constitutional under the Commerce Clause and the Fifth and the Tenth Amendments); United States v. Lewis, 236 F.3d 948 (8th Cir. 2001) (holding that section 922(g)(9) does not violate the Commerce Clause, the Equal Protection Clause, the Second Amendment, or the Eighth Amendment); United States v. Jones, 231 F.3d 508, 514–15 (9th Cir. 2000) (rejecting a Commerce Clause challenge to 18 U.S.C. § 922(g)(8)); United States v. Cunningham, 161 F.3d 1343, 1345–47 (11th Cir. 1998); (rejecting a Commerce Clause challenge to section 922(g)(8)).

22. *See, e.g.,* United States v. Meade, 175 F.3d 215, 224–25 (1st Cir. 1999) (rejecting a Tenth Amendment challenge to section 922(g)(8)); United States v. Bostic, 168 F.3d 718, 723–24 (4th Cir. 1999) (rejecting a Tenth Amendment challenge to 18 U.S.C. § 922(g)(8)); United States v. Hemmings, 258 F.3d 587, 594 (7th Cir. 2001) (holding that neither the Second nor the Tenth Amendment bars federal firearms regulation).

23. United States v. Emerson, 270 F.3d 203, 260–63 (5th Cir. 2001) (rejecting a Second Amendment challenge to section 922(g)(8)); United States v. Jackubowski, 63 F. App'x 959, 961 (7th Cir. 2003) (holding that federal law barring gun possession after a felony conviction, 18 U.S.C. § 922(g)(1), does not violate the Second Amendment, and noting that all federal appellate courts to consider the issue have held that federal regulation of firearms is constitutional).

24. City of Cleveland v. Carpenter, No. 82786, 2003 WL 22976619, at *1 (Ohio Ct. App., Dec. 18, 2003).

25. *Id.* at *1.

26. *Id.* at *3–*4.

27. *Id.* at *5.

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28. State v. Wahl, 839 A.2d 120, 122 (N.J. Super. Ct. App. Div. 2004). The court did remand to the Family Part judge to determine whether the seized firearms had ever been shipped or transported in interstate commerce, another required element of the federal statute. *Id.* at 134. The court noted, however, that "the market in firearms is heavily interstate in nature . . . and it would be indeed rare that a firearm, or at least some of its component parts, would have never moved across state lines." *Id.*

29. *See, e.g.,* Hesse v. Pennsylvania State Police, 850 A.2d 829, 832 (Pa. Commonw. Ct. 2004).

30. *See, e.g.,* United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999) (both the statute's plain language and legislative history demonstrate that the predicate offense need not contain a domestic relationship between the parties as an element); United States v. Meade, 175 F.3d 215, 218–19 (1st Cir. 1999) (similarly); United States v. Barnes, 295 F.3d 1354, 1360–61 (D.C. Cir. 2002) (similarly).

31. United States v. Nobriga, 408 F.3d 1178, 1181–83 (9th Cir. 2005).

32. The "modified categorical approach" is based on the U.S. Supreme Court's approach in Taylor v. United States, 495 U.S. 575, 602 (1990) and reaffirmed in Shepard v. United States, 125 S. Ct. 1254 (2005). Under this approach, courts may consider only "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard,* 125 S. Ct. at 1263.

33. *Nobriga,* 405 F.3d at 1181.

34. *Id.* at 1181–83.

35. *Id.* at 1183.

36. United States v. Calor, 340 F.3d 428 (6th Cir. 2003).

37. *Id.* at 429.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 430.

42. *Id.*

43. *Id.*

44. *Id.* at 431.

45. *Id.*

46. *Id.*

47. United States v. Bunnell, 106 F. Supp. 2d 60 (D. Me. 2000).

48. *Id.* at 66.

49. *Id.*

50. *Id.*

51. *Id.*

52. *See* Tom Lininger, *A Better Way to Disarm Batterers,* 54 Hastings L.J. 525, 530–31 (2003).

53. *Id.* at 531. This information was provided to Lininger by the Executive Office for United States Attorneys on July 24, 2002. *Id.* at 530 n.18. The report also predicted that 58 additional cases would be filed by the end of 2002. *Id.* at 531.

54. *Id.*

55. *Id.* at 531 & n.23 (citing United States v. Wilson, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, J., dissenting)). Judge Posner estimated that approximately 100,000 domestic violence protection orders are issued each year and that, since 40 percent of U.S. households own guns, approximately 40,000 people would be in violation of section 922(g)(8). *Id.*

56. Lininger, *supra* note 52, at 532 (relying on report from Executive Office for United States Attorneys).

57. Comment, *Domestic Violence and Guns: Seizing Weapons Before the Court Has Made a Finding of Abuse,* 23 Vt. L. Rev. 349, 364 (1998) (referring to report from Vermont's U.S. Attorney that it is rare for the U.S. Attorney's Office to enforce the federal firearms laws against persons subject to domestic violence protection orders, because of limited resources).

58. *See* Melanie L. Mecka, Note, *Seizing the Ammunition From Domestic Violence: Prohibiting the Ownership of Firearms by Abusers,* 29 Rutgers L.J. 607, 643–44 (1998). For example, in 1997, the president of the Salt Lake County, Utah, Sheriff's Association said that the federal law provides no penalty if states choose not to "mirror the federal law." *Id.* at 644 n.211 (citing Judy Fahys, *House Battles Over Gun Bill that Disarms Domestic Abusers; Gun Bill Would Disarm Domestic Abusers,* Salt Lake City Trib., Jan. 31, 1997, at A1).

59. *Id.* at 645.

60. *Id.* at 644–45.

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61. *Id.* at 637–38.

62. *See* Carrie Chew, *Domestic Violence, Guns, and Minnesota Women: Responding to New Law, Correcting Old Legislative Need, and Taking Cues From Other Jurisdictions,* 25 Hamline J. Pub. L. & Pol'y 115, 149 & nn.166–67 (2003) (citing correspondence from domestic violence victim advocates in Minnesota and Texas); Lisa D. May, *The Backfiring of the Domestic Violence Firearm Bans,* 14 Colum. J. Gender & L. 1, 1–2 (2005) (describing case in rural Missouri jurisdiction where judge denied protection order despite substantial evidence of physical injury and later in court cited the approach of quail-hunting season as one reason not to issue another protective order). May also describes a case in Hennepin County (Minneapolis) where the judge expunged a police department employee's domestic violence record, to avoid the consequences of the federal firearms law. *Id.* at 1. This observation is also based on discussions between the author and victim advocates in such jurisdictions as Maine and Montana.

63. *See* Michelle N. Deutchman, Note, *Getting the Guns: Implementation and Enforcement Problems With California Senate Bill 218,* 75 S. Cal. L. Rev. 185, 209 (2001) (quoting Mary Malefyt, then senior attorney at the Pennsylvania Coalition Against Domestic Violence).

64. Darren Mitchell & Susan B. Carbon, *Firearms and Domestic Violence: A Primer for Judges,* Ct. Rev. 32, 38 (Summer 2002).

65. Chew, *supra* note 62, at 149 & nn.166–67.

66. *Id.;* Deutchman, *supra* note 63, at 209.

67. Chew, *supra* note 62, at 149 & nn.166–67; Deutchman, *supra* note 63, at 209.

68. *Id.*

69. State v. Wahl, 839 A.2d 120 (N.J. Super. Ct. App. Div. 2004).

70. 18 U.S.C. § 922(g)(9) (2000 & Supp. 2004).

71. *Wahl,* 839 A.2d at 128 (N.J. Super. Ct. App. Div. 2004).

72. U.S. Const. art. VI, cl. 2.

73. *Wahl,* 839 A.2d at 130 (quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (quoting Gibbons v. Ogden, 22 U.S. 1, 211 (1824))).

74. *Id.*

75. *Id.* at 133 (quoting N.J. Stat. Ann. § 2C:25-21d(3) (West 2005)).

76. *Wahl,* 839 A.2d at 122 (finding that weapons forfeiture provisions contained in N.J. Stat. Ann. § 2C:25-21g[9] and 18 U.S.C. § 922(g)(9) are "in harmony").

77. *Id.*

78. Conkle v. Wolfe, 722 N.E.2d 586, 593–94 (Ohio Ct. App. 1998).

79. *Id.*

80. *Id.*

81. *Id.* at 593.

82. *Id.* at 594.

83. *Id.*

84. Benson v. Muscari, 769 A.2d 1291 (Vt. 2001).

85. *Id.* at 1298.

86. United States v. Brailey, 408 F.3d 609 (9th Cir. 2005).

87. *Id.*

88. *Id.*

89. *Id.*

90. Mitchell & Carbon, *supra* note 64, at 38.

91. *Id.*

92. *Id.*

93. Sharon Gold, Note, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws,* 91 Ky. L.J. 935, 952–53 (2002–03).

94. See Mitchell & Carbon, *supra* note 64, at 34 (collecting state statutes and noting differences in firearm prohibitions in domestic violence cases). Mitchell and Carbon note that, as of 2002, in at least nine states a civil protection order meeting certain criteria creates a mandatory prohibition on firearm possession, while in a greater number of states judges have discretion whether to include a term prohibiting firearms in the protection order. *Id.* Mitchell and Carbon also note differences in state law regarding criminal cases. In some states, a domestic violence conviction triggers a mandatory firearm prohibition, while in other states such a prohibition is discretionary, and the law may require the judge to make specific findings. *Id.* Some states permit a firearm prohibition to be imposed as a condition of bail or probation. *Id.* In addition, some states limit the weapon ban to those

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weapons actually used or threatened to be used in the offense. *Id.*

95. *See* Chew, *supra* note 62, at 132–37 (providing examples of inconsistencies among state laws and their variation from federal law); Timothy Johnson, *Domestic Violence and Federal Firearms Laws,* 33-SEP Colo. Law. 61, 63 (2004) (discussing the differences between federal law and Colorado law in areas such as the definitions of *domestic violence* and *intimate relationship*).

96. *See* Mecka, *supra* note 58, at 622–23.

97. *See, e.g., Proposed PFA Rules Rattle Gun Owners; Seizure of Weapons Is Focus of Debate,* Intelligencer J. (Philadelphia, Pa.), Apr. 24, 2004, at A1. (proposed revision to Pennsylvania's domestic violence law, which would give judges explicit discretion to take all guns from individuals under protection-from-abuse orders, is subject of controversy).

98. Paul Carpenter, *Some See PFA Bill as an Expansion of Gun Control,* Morning Call (Allentown, Pa.), May 23, 2004, at B1 (quoting Gun Owners of America press release).

99. Nancy Charron, *Legislation Targets Guns of Domestic Violence Offenders,* News J. (Wilmington, Del.), Feb. 18, 1999, at 3B. The proposed law would also have prohibited weapon possession while a protection order was in effect. *Id.*

100. *Id.*

101. *Id.*

102. Okla. Stat. tit. 22, § 60.8 (2003) (emphasis added).

103. *Id.*

104. Mont. Code Ann. § 46-6-603(1) (2005).

105. Ohio Rev. Code Ann. § 2935.03(B)(3)(h) (West Supp. 2005).

106. N.Y. C.P.L.R. 530.14 (McKinney Supp. 2005); N.Y. Fam. Ct. Act § 842-a (McKinney Supp. 2005). *See* Robert F. Nicolais, *State and Federal Statutes Affecting Domestic Violence Cases Recognize Dangers of Firearms,* 71-Nov N.Y. St. B.J. 39, 40 (1999).

107. Nicolais, *supra* note 106, at 40–43; N.Y. C.P.L.R. 530.14; N.Y. Fam. Ct. Act § 842-a.

108. Nicolais, *supra* note 106, at 42–43.

109. *Id.* at 45.

110. Connecticut law also has a definition of *intimate relationship* that differs from the federal law. The federal law includes partners who are cohabiting or have formerly cohabited. The Connecticut statute's definition of *family or household member* is broader because it does include "persons in, or [who] have recently been in, a dating relationship," but it does not define the meaning of *recent,* so that former intimate partners may not necessarily be covered by the law. Conn. Gen. Stat. § 46b-38a(2) (2004). *See also* State v. Logan, No. 18CR020108012, 2003 WL 22413490, at *1, *2 (Conn. Super. Ct., Oct. 6, 2003) (noting the limitations of the definition of *relationship* under the statute).

111. Nicolais, *supra* note 106, at 45.

112. *Id.*

113. *Id.* at 45–46.

114. N.J. Stat. Ann. § 2C:25-28j (West 2005) (authorizing ex parte order to include "forbidding the defendant to possess any firearm or other weapon . . . , ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located . . ."). *See also* State v. Cassidy, 843 A.2d 1132, 1134 (N.J. 2004) (discussing warrant portion of order form).

115. N.J. Stat. Ann. § 2C:25-21d[3].

116. *Id.* Despite what appears to be the plain language in the statute, the New Jersey appellate court has held that the 45-day period in which the prosecutor must file a forfeiture petition runs not from the actual seizure of the weapon but instead from the date on which the prosecutor either came to possess the weapon or learned of its seizure. State v. Saavedra, 647 A.2d 1348, 1350–51 (N.J. Super. Ct. App. Div. 1994). *See also In re* the Seized Firearms Identification Card of Peter Hand, 700 A.2d 904, 907–08 (N.J. Super. Ct. Ch. Div. 1997) (noting the conflict between the legislation's clear language and the statutory construction by the appellate division, to which the lower court must adhere).

117. N.J. Stat. Ann. § 2C:25-21d[3]. There has been substantial case law in New Jersey on this statute, particularly the apparent conflict between the mandatory language requiring return upon dismissal of the complaint and the discretionary language permitting the court to order that weapons be retained if the owner is "unfit." *See In re* Return of Weapons to J.W.D., 693 A.2d 92, 93 (N.J. 1997) (overruling earlier case law and holding that the mandatory language did not trump the court's discretionary power, so that despite the dismissal of the complaint, a court may still retain the seized weapons if it determines that the defendant continues to "pose a

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threat"). *See also* State v. Volpini, 677 A.2d 780, 785–87 (N.J. Super. Ct. 1996) (earlier lower-court case using reasoning later employed in *J.W.D.* to find that, since the clear legislative purpose of the New Jersey statute was to offer the maximum protection to domestic violence victims, the inconsistency between parts of the statute should be resolved in favor of permitting the court to consider additional grounds to retain the weapons even where a domestic violence complaint has been withdrawn).

A New Jersey appellate court considered a related issue under the same statute. In a situation in which the prosecutor had failed to file a petition to retain the seized weapons within the 45-day time period required in section 2C:25-21d[3], the defendant argued that the weapons must be returned to him. State v. S.A., 675 A.2d 678, 681–82 (N.J. Super. Ct. App. Div. 1996). However, the court found that this provision must be read together with the part of subsection d[3] that finds that no weapons shall be returned if the court finds that "the owner is unfit or that the owner poses a threat to the public in general or a person or persons in particular," unless "the domestic violence situation no longer exists." *Id.* at 682. Therefore, the state has the right to retain the weapons as long as the court finds the owner to be a threat to the victim of domestic violence. The right to petition for forfeiture within 45 days of seizure is an additional right, but "failure of the state to seek a forfeiture does not give the defendant the automatic right under New Jersey law to the return of the seized weapons so long as the domestic violence restraining order is outstanding." *Id.* at 683.

118. Ariz. Rev. Stat. § 13-3601 (West 1994 & Supp. 2005).

119. Ariz. Rev. Stat. § 13-3601C.

120. *Id.*

121. Ariz. Rev. Stat. § 13-3601D, E.

122. Ariz. Rev. Stat. § 13-3601F.

123. Deutchman, *supra* note 63, at 189.

124. *Id.*

125. Cal. Fam. Code § 6389(a) (West 1994 & Supp. 2005) ("A person subject to a protective order . . . shall not own, possess, purchase, or receive a firearm while that protective order is in effect").

126. Cynthia D. Cook, *Triggered: Targeting Domestic Violence Offenders in California,* 31 McGeorge L. Rev. 328, 331 (2000) (describing the firearm surrender order process).

127. Deutchman, *supra* note 63, at 190.

128. Cal. Fam. Code § 6389(g).

129. Cook, *supra* note 126, at 331.

130. *Id.* at 335; Deutchman, *supra* note 63, at 190–91.

131. Cal. Fam. Code §§ 6200–6390; Deutchman, *supra* note 63, at 190 n.34.

132. Cook, *supra* note 126, at 342 n.131.

133. Cal. Fam. Code § 6304.

134. Cal. Fam. Code § 6389; Cook, *supra* note 126, at 335–36; Deutchman, *supra* note 63, at 191.

135. *Id.*

136. Deutchman, *supra* note 63, at 191.

137. Cal. Fam. Code § 6389(c); Deutchman, *supra* note 63, at 192. If the respondent is not at the hearing, he or she has 48 hours after being served with the order to follow this procedure. *Id.*

138. Cal. Fam. Code § 6389(c). This requirement is the same for defendants who were not present at the hearing but were served with the order. *Id.*

139. Cal. Fam. Code § 6389(e).

140. Cal. Fam. Code § 6389(g); Deutchman, *supra* note 63, at 192.

141. Cal. Fam. Code § 6389(h). This exception was also in the 1994 legislation. Deutchman, *supra* note 63, at 192–93. The law places several restrictions on possession of a weapon under this exception. *Id.*

142. Cal. Penal Code § 12028.5(b) (West 1994 & Supp. 2005). The Penal Code also requires that each law enforcement agency track and report the total number of domestic violence cases involving weapons to the state Attorney General on a monthly basis. Cal. Penal Code § 13730(a). The Attorney General, in turn, will compile this information and provide an annual report to the Governor, the Legislature, and the public. Cal. Penal Code § 13730(b). The Penal Code also requires that each law enforcement agency develop a domestic violence incident report form that includes a notation of whether the officer inquired as to the presence of a firearm or other deadly weapon and whether that inquiry disclosed the presence of such firearm or weapon. Cal. Penal Code § 13730(c)(3).

143. Cal. Penal Code § 12028.5(b).

144. *Id.* Prior to a 2002 amendment that provided a maximum of five business days after the seizure in which

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the weapon must be returned, the statute permitted a shorter maximum of 72 hours. See CAL. PENAL CODE § 12028.5, Notes.

145. CAL. PENAL CODE § 12028.5(f). The law originally provided law enforcement with only 10 days to file the petition, but this was changed to 30 days in a 2000 amendment. Deutchman, *supra* note 63, at 195 n.70. A 2002 amendment further extended this time period to 60 days. CAL. PENAL CODE § 12028.5, Notes.

146. CAL. PENAL CODE § 12028.5(g).

147. CAL. PENAL CODE § 12028.5(h).

148. *Id.* A 2002 amendment changed the standard of proof to "preponderance of the evidence" from the previous, higher standard of "clear and convincing evidence." CAL. PENAL CODE § 12028.5, Notes.

149. CAL. PENAL CODE § 12028.5(j).

150. *Id.* This language was added in a 2002 amendment.

151. CAL. PENAL CODE § 12028.5(j).

152. N.J. STAT. ANN. § 2C:25-21d[1], [2] (West 2005).

153. State v. Johnson, 799 A.2d 608, 610–11 (N.J. Super. Ct. App. Div. 2002) (citing several U.S. Supreme Court cases discussing the "special-needs" exception to Fourth Amendment requirements).

154. N.J. STAT. ANN. § 2C:25-21d[1]; State v. Perkins, 817 A.2d 364, 370–71 (2003).

155. State v. Saavedra, 647 A.2d 1348, 1349 (N.J. Super. Ct. App. Div. 1994) ("Protection of the victim [is] the clear and unequivocal message. Law enforcement personnel and the courts [are] encouraged to insure, indeed charged with insuring, the safety of all victims exposed to actual or potential acts of domestic violence or abuse"); *Perkins,* 817 A.2d at 370; State v. Masculin, 809 A.2d 882 (N.J. Super. Ct. Ch. Div. 2002).

156. *Perkins,* 817 A.2d at 364.

157. *Id.* at 366.

158. *Id.* at 366–67.

159. *Id.* at 369.

160. *Id.* at 369–70 (quoting State v. Johnson, 799 A.2d 608, 611 (N.J. Super. Ct. App. Div. 2002)). The court noted that "reasonable cause," the words used in the statute, were equivalent to "reasonable suspicion," a lesser standard of suspicion than "probable cause." *Id.*

161. *Perkins,* 817 A.2d at 370 (quoting *Johnson,* 799 A.2d at 611).

162. *Id.* at 370. However, in the earlier case of State v. Younger, 702 A.2d 477, 480 (N.J. Super. Ct. App. Div. 1997), a New Jersey appellate court found that a warrantless search of a change purse under the domestic violence statute violated the Fourth Amendment. The consent by the defendant's grandmother to search in the defendant's bedroom was limited to a search for a handgun, which could not possibly be in a small change purse. *Id.* at 480. The court noted that the state statute is subject to the U.S. Constitution under the Supremacy Clause and so is subject to the limits on searches imposed by the Fourth Amendment. *Id.* at 481. The court found that "[t]he authority granted by the Domestic Violence Act does not constitute a license for the officer to conduct a general and intensive search beyond what is reasonable to locate the weapon the officer believes is on the premises." *Id.*

163. *Perkins,* 817 A.2d at 370–71.

164. Commonwealth v. Wright, 742 A.2d 661 (Pa. 1999). The relevant Pennsylvania statute is 18 PA. CONS. STAT. ANN. § 2711(b) (West Supp. 2005).

165. Commonwealth v. Wright, 742 A.2d at 661.

166. *Id.* at 662.

167. *Id.* at 662–63.

168. *Id.* at 663. The defendant was convicted, and the superior court affirmed. *Id.*

169. *Id.* at 664.

170. *Id.*

171. *Id.* at 664–65.

172. *Id.* at 666.

173. State v. Rodriguez, No. 22978, 86 P.3d 1000, 2004 WL 605318 (Haw. 2004).

174. HAW. REV. STAT. § 709-906(4)(f) (West 2004) (emphasis added).

175. *Rodriguez,* 2004 WL 605318, at *8 (citing State v. Peseti, 65 P.3d 119, 128 (Haw. 2003) (finding that a statutory privilege must defer to the defendant's constitutional rights in the context of cross-examination)).

176. *Rodriguez,* 2004 WL 605318 at *8.

177. N.J. STAT. ANN. § 2C:25-28j (West 2005). The court must specify the reasons for and the scope of the search and seizure authorized by the order. *Id.*

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178. N.J. Stat. Ann. § 2C:25-29b ("In addition to any other provisions, any restraining order issued by the court shall bar the defendant from purchasing, owning, possessing or controlling a firearm . . . during the period in which the restraining order is in effect or two years whichever is greater").

179. N.J. Stat. Ann. § 2C:25-29b[16]. The judge must also specify the reasons for and scope of the search and seizure authorized. *Id.*

180. State v. Johnson, 799 A.2d 608 (N.J. Super. Ct. App. Div. 2002).

181. *Id.* at 611.

182. *Id.* "Reasonable cause" is identical to the "reasonable suspicion" standard.

183. Kelly v. Mueller, 861 A.2d 984 (Pa. Super. Ct. 2004).

184. *Id.* at 988.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 990. The provision of the statute referred to is 23 Pa. Cons. Stat. Ann. § 6108(a)(7) (West Supp. 2005).

189. *Kelly,* 861 A.2d at 991.

190. *Id.* at 993.

191. *Id.*

192. The Pennsylvania chapter of the American Civil Liberties Union criticized the decision: "The court can certainly order that weapons be turned in, but to actually go and authorize a search and seizure without a warrant of probable cause being issued seems to me a stretch of the Protection from Abuse Act." *No-Warrant Searches for Guns OK'd,* Evening Sun (Hanover, Pa.), Nov. 9, 2004 (quoting Larry Frankel, legislative director of ACLU's Pennsylvania chapter).

193. Golden v. Bay Village Police Dep't, No. 79379, 2002 WL 253878, at *1 (Ohio Ct. App. 2002).

194. *Id.*

195. A specific court action filed to regain possession of personal property. *See* Bryan A. Garner, A Dictionary of Modern Legal Usage 757–58 (2d ed. Oxford 1995).

196. *Golden,* 2002 WL 253878, at *1.

197. *Id.*

198. *Id.*

199. *Id.* at *2.

200. *Id.*

201. *Id.*

202. Dragani v. Dragani, 42 Pa. D. & C.4th 295, 304 (Ct. Common Pleas 1999).

203. *Id.*

204. *Id.* at 302–03.

205. *Id.* at 303–04. Section 922(g)(8) prohibits firearm possession by persons subject to a final protection order, which meets the following criteria: (1) the order must have been entered after the defendant had notice and an opportunity to be heard; (2) the plaintiff or protected person is an "intimate partner" within the definition of the federal statute, or a child of an intimate partner or child of the defendant; (3) the terms of the order restrain the defendant from harassing, stalking, or threatening the plaintiff or protected person; and (4) the order includes a finding that the defendant represents a credible threat to the physical safety of the intimate partner or child or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury. 18 U.S.C. § 922(g)(8) (2000). *See also Dragani,* 42 Pa. D. & C.4th at 303–04.

206. *See* Emily J. Sack, Family Violence Prevention Fund, Creating a Domestic Violence Court: Guidelines and Best Practices 22–23 (2002) (discussing the negative impact of diversion models on defendant accountability for domestic violence crimes).

207. Deutchman, *supra* note 63, at 200–01. (providing examples across the country of very low surrender rates despite legislation requiring firearm relinquishment).

208. These "Procedures for Firearm and/or Ammunition Surrender" are on file with the author. All of the information in this paragraph is taken from these procedures.

209. All of the forms discussed in this paragraph are contained in an information packet from the Miami–Dade County Circuit Court (11th Jud. Dist. of Fla.), on file with the author.

210. The court also developed a form *Affidavit of a Third Party for Sale/Transfer of Firearm and/or Ammunition,* to provide documentation for the respondent that he or she will be transferring the weapon to a third party legally

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allowed to own it, and a form *Order Releasing Firearms and/or Ammunition to Third Party.*

211. This information sheet is contained within the information packet discussed *supra* note 209, on file with the author. All of the information in this paragraph is taken from this information sheet.

212. Castro, *supra* note 3.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* Though the city of Seattle is located within King County, it has its own law enforcement agency and court system.

223. Castro, *supra* note 3.

224. *Id.*

225. Nicolais, *supra* note 106, at 43.

226. *Id.*

227. *Id.* Another example is the sheriff's department in Contra Costa County, California, which has designated one officer to be responsible for filing the petitions and acting as department representative at hearings on the petition. One commentator reports that Contra Costa County now has a far higher rate of filed petitions for forfeiture of weapons than other counties in California. Deutchman, *supra* note 63, at 199–200.

228. There is no double jeopardy problem with state and federal prosecutions for the same conduct, because they are "dual sovereigns."

229. Gold, *supra* note 93, at 946.

230. United States v. Jones, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999).

231. United States v. Taylor, 240 F.3d 425, 426–27 (4th Cir. 2001) (describing Project Exile).

232. *Id.*

233. *Id.*

234. Gold, *supra* note 93, at 946.

235. Edwin E. Hamilton, Police Foundation Reports, Prelude to Project Safe Neighborhoods: The Richmond, Virginia Experience 1–2 (Jan. 2004; Gold, *supra* note 93, at 947.

236. Gold, *supra* note 93, at 947.

237. *Id.* at 948.

238. The federal project, launched by President Bush in May 2001, is called Project Safe Neighborhoods. Hamilton, *supra* note 235, at 1–2.

239. Gold, *supra* note 93, at 947 (during the first year of Project Exile's operation in Richmond, murder rates dropped 33 percent).

240. *See, e.g.,* United States v. Taylor, 240 F.3d 425, 427–28 (4th Cir. 2001) (rejecting defendant's argument that local police were acting as federal officers when they arrested him, so that federal speedy-trial provisions should control); United States v. Nathan, 202 F.3d 230 (4th Cir. 2000) (rejecting defendant's argument that Project Exile interfered with state criminal proceedings and violated principles of federalism).

241. United States v. Jones, 36 F. Supp. 2d 304, 313 (E.D. Va. 1999).

242. For an extensive discussion of the principles of specialized domestic violence courts and of various models, see Sack, *supra* note 206, *passim.* See also May, *supra* note 62, at 33 (discussing how integrated domestic violence courtroom would ensure judicial and court personnel expertise in domestic violence issues).